75-5384

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1975

NO. 75-5384

ERNEST JOHN VINSON,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on June 6, 1975.

CITATION TO OPINION
BELOW

The opinion of the Supreme Court of North Carolina is reported at _____ N.C. ____, 215 S.E. 2d 60 (1975), and is set out in Appendix A hereto, pp. 1a-14a, infra.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on June 6, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

II. Whether the exclusion for cause of veniremen on the grounds of their expressed attitudes toward the death penalty violated Petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> N.C. Gen. Stat. §14-21 (repl. vol. 1969):
> "Punishment for rape.--Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." 1/
>
> N.C. Gen. Stat. §15-187 (repl. vol. 1975):
> "Death by administration of lethal gas.--Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."
>
> N.C. Gen. Stat. §15-188 (repl. vol. 1975):
> "Manner and place of execution.--The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which

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1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on June 6, 1975, affirming petitioner's conviction and death sentence. Petitioner, Ernest John Vinson, a black man, was sentenced to die on March 27, 1974, in the Wilson County Superior Court of North Carolina upon conviction for the rape of Norma Coleen Ferguson, a white woman.[2/]

2/ Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-21 (repl. vol. 1969), as construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (January 18, 1973). The North Carolina Legislature subsequently enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Session, 1974) effective April 8, 1974, which imposes the death penalty for certain "first degree" rapes. This statute, now codified as N.C. Gen. Stat. §14-21 (1974 supp.), provides:

> "Rape; punishment in the first and second degree.--Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape--
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
> (2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.
>
> (b) Second-Degree Rape--Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

However, the Supreme Court of North Carolina has expressly held that the enactment of this statute did not affect death sentences for rape imposed under the State v. Waddell procedure. In State v. Williams, N.C. __, 212 S.E. 2d 113 (1975), the Court affirmed a death sentence for "rape"

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Norma Coleen Ferguson testified that on December 5, 1973, while alone

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2/ cont'd.

which had been imposed under the Waddell procedure for a crime committed on May 16, 1973, which, if it had been committed after April 8, 1974, would appear to have been non-capital second-degree rape. The Court ruled that the 1974 rape statute was nowise retroactive:

> "In clear, explicit terms the Legislature provided 'This act shall become *** applicable to all offenses hereafter committed.' Had these words been omitted, the Act would, nevertheless, apply to all offenses committed after its effective date, 8 April 1974. Consequently, these words were not used for the purpose of giving the Act that effect. It is a well established principle of statutory construction that a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be suplusage . . . . We construe the provision in the 1974 Act, 'This act shall become * * * applicable to all offenses hereafter committed' as a saving clause, showing the intent of the Legislature to leave the preexisting statute in effect as to the elements of and punishment for the crime of rape committed prior to 8 April 1974."

212 S.E.2d at 119-120. Chief Justice Sharp, 212 S.E. 2d at 123-125, and Mr. Justice Exum, 212 S.E.2d at 121-122, dissented from this construction of the 1974 rape statute and would have applied it retroactively to invalidate a death sentence which was imposed "for a crime which is not now punishable by death," (212 S.E.2d at 125) (dissenting opinion of Chief Justice Sharp)).

In the decision announced in petitioner's case, a majority of the North Carolina Supreme Court declined to vacate petitioner's death sentence and to consider whether the evidence would have sustained only a non-capital second degree rape conviction in a post-April 8, 1974 case. Chief Justice Sharp dissented from this ruling for reasons stated in the State v. Jarrette dissent. Mr. Justice Copeland and Mr. Justice Exum dissented from this ruling for the reasons stated in the State v. Williams dissents. 215 S.E.2d at 73; App. A, infra, at 14a. The three dissenting judges voted to remand for imposition of a sentence of life imprisonment.

On June 24, 1975, the North Carolina General Assembly enacted H.B. 953, c. 749 (1975 Sess.), effective immediately, which provides that any defendant sentenced to death for a rape occurring after January 18, 1973, and prior to April 8, 1974, whose death sentence was sustained on appeal may apply to a trial judge of the judicial district in which the rape trial was held "to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 1201, Session Laws of 1973," (Section 2(a)). Section 2 of this law provides:

> "(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept briefs in behalf of the defendant and the State.
>
> (c) Thereupon, the judge shall determine the following question:
>
> > Is the evidence presented at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to

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at her place of employment, Fiberglass and Sports, in Wilson, North Carolina, the Defendant entered, pointed a gun at her head, threatened to kill her and told her to "get naked." She then testified that the Defendant penetrated her and that at no time did she scream, kick, scratch or bite him, nor did she give him permission. She further testified that she could smell alcohol on Ernest John Vinson and that he then forced her to swallow a handful of diet pills. Norma Coleen Ferguson testified that someone entered the store and left while this was going on and that she had a telephone conversation with a supplier during this time. She further testified that Vinson took the keys to her car, left and that she then called the police. Thomas Edwards then testified that, on December 5, 1973, he was driving a truck for Roadway Express and that his delivery was to Fiberglass and Sports at about one p.m. He testified that he went in the front door of the business, stayed about thirty seconds and heard a lady's voice in the office to the left, which he assumed to be a response to a telephone call. He testified that he then left, drove back to his office and got his supervisor to call Fiberglass and Sports and that he said that the woman sounded all right. He further testified that he then went back to Fiberglass and Sports, entered the building, and, although he could be mistaken, he saw and conversed with the Defendant for a period of eight to ten seconds. He further testified that he then went around to the back door, waited about five minutes, then went to a nearby business and called his supervisor again. When he returned

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2/ cont'd.

> a jury on the charge of first degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?
>
> (d) If the question is answered in the affirmative, the defendant shall remain subject to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of a second degree rape for a rape committed after April 8, 1974." (Emphasis added).

to Fiberglass and Sports the police and rescue squad were both there. Detective Johnny Moore, of the City of Wilson Police Department testified that on December 5, 1973, he went to Fiberglass and Sports and that Norma Ferguson made a statement to him that she had been raped by a black man and that the man had made her take a handful of pills that she had in her pocketbook. He further testified that Norma Ferguson described the man as being young, tall, clean shaven with very uncombed and unkept hair, and that the man had used a pistol. Detective Moore then testified that Thomas Edwards was there and that he had seen a black man but did not give too good a description of him; however, that the person looked very intelligent. He then testified that that night he carried approximately twelve photographs to Mr. Edwards, all of black males, but that the Defendant was not included in those photographs. Mr. Moore then testified that as a result of speaking with Dr. Kirkland, he waited three days, then interviewed Norma Ferguson and that she told him that when she was alone at Fiberglass and Sports on December 5, 1973, the Defendant entered with a pistol, forced her into the back room, told her to "get naked" and had sexual intercourse with her while threatening to kill her. Detective Moore further testified that the Defendant then made Norma Ferguson eat some pills from her pocketbook and that on that day the Defendant was under arrest on other charges and was in the Wilson County jail. Detective Moore further testified that he took twelve photographs to Norma Ferguson and that she identified a photograph of Ernest John Vinson by saying, "That's the man." On cross-examination it was brought out that Norma Ferguson looked through the photographs twice prior to making an identification. John A. Kirkland, M.D., then testified for the State that on December 5, 1973, in his office at the Wilson Clinic, he was asked to examine Norma Coleen Ferguson for the possibility of rape and that, based upon his examination and questions to her, he discovered the presence of active sperm in her vagina. He further testified that she told him that a black man entered the place where she worked and, at gunpoint, forced her to perform an unnatural sex act; that he then raped her; and that

he then forced her to take some capsules, and left, stealing her car. Dr. Kirkland then testified that she was hospitalized in the intensive care unit overnight and released after twenty-four hours, and that he found no physical evidence of rape other than the fact that she had had recent intercourse. The Defendant then offered the testimony of Eugene D. Maynard, M.D., who testified that he is a psychiatrist and was formerly regional director of Forensic Psychiatry at Cherry Hospital. Dr. Maynard testified that he examined and observed the Defendant in December 1973, and that as a result of a series of tests, he formed the diagnosis that the patient was suffering from mental retardation with a mental age of approximately fifteen or sixteen years, drug dependence of all known varieties of drugs, and that he had anti-social personality. Dr. Maynard further testified that the Defendant had been confined in the State Hospital on prior occasions and that the anti-social personality he referred to is what was formerly known as a psychopathic personality.

At the conclusion of the evidence, the trial court charged the jury that it could find Petitioner guilty of rape or not guilty. The jury returned a verdict of guilty of rape and the court thereupon sentenced the Petitioner to death.

On June 6, 1975, the Supreme Court of North Carolina, with three judges dissenting in regard to the death penalty, affirmed Petitioner's conviction and death sentence.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. At Petitioner's Assignment of Error Number 8 contended that there was error for that imposition of the death penalty in this case is cruel and unusual punishment. The Supreme Court of North Carolina rejected this claim:

> "Finally, Defendant contends that imposition of the death penalty in this case constitutes cruel and unusual punishment. This contention has heretofore been considered and determined to be without merit in various cases. State v. Vick, 287 N.C. 37, 213 S.E. 2d 335 (1975); State v. Armstrong, 287 N.C. 60, 212 S.E. 2d 894 (1975), and cases cited therein. Therefore, Defendant's Eighth Assignment based on this contention is overruled."

State v. Vinson, ____N.C. ___, 212 S.E. 2d 60 at 72, 73 (1975); App. A, infra, at 13a, 14a.

2. Petitioner's Grouping and Assignments of Error in the record on appeal assigned as error the excusing for cause of prospective jurors who:

> "In response to questions by the Solicitor and the Court as to whether the juror might return a verdict of guilty in any case in which a verdict of guilty might result in the imposition of the death penalty, she stated that she would not."

ASSIGNMENT OF ERROR NO. 1
Exception No. 1 (R p 5)

The Supreme Court of North Carolina ruled:

> "There is no merit in this Assignment. The juror was properly excused for cause. State v. Monk, 286 N.C. 509, 212 S.E. 2d 125 (1975); State v. Ward, 286 N.C. 304, 210 S.E. 2d 407 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974); State v. Crowder, 285 N.C. 42, 203 S.E. 2d 38 (1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, Petitioner adopts the "Reasons for Granting the Writ" sections, respectively, of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B, infra) and of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974), at 19-22 (attached as Appendix C, infra). On October 29, 1974, this Court granted certiorari in Fowler v. North Carolina, No. 73-7031, to consider a similar question.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDE TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

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In order to avoid burdening the Court with length and repetitious matter, Petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Lampkins v. North Carolina, No. 75-_____ (filed _____, 1975), at 14-20 and 1d-7d (attached as Appendix D, infra).

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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Appendix A

State v. Vinson, N.C. __,
215 S.E.2d 60 (1975).

to this, defendant himself testified both ways.

In *Cooper* the defendant did not testify. For proof that he killed his victims after premeditation and deliberation, the State had to rely upon circumstantial evidence. Since all the evidence tended to show that Cooper was a chronic sufferer from paranoid schizophrenia and subject to hallucinations and delusions, he contended—in my view, correctly—that the evidence of his mental disease was for the jury's consideration in determining whether the State had proved beyond a reasonable doubt the essential elements of murder in the first degree, *i. e.*, that he had actually formed a specific intent to kill his wife and children and had taken their lives after deliberating and premeditating their deaths.

The dissent in *Cooper* was not based on a doctrine of diminished or partial responsibility. Its thesis was full responsibility, but only for the crime committed. *Id.* at 594, 213 S.E.2d 323.

In this case, on the issue of insanity, the judge charged the jury as follows: "I charge that if you are satisfied from the evidence that the defendant, at the time of the alleged crime, and as a result of mental disease or defect, either did not know the nature and quality of his act, or did not know that it was wrong, he would be not guilty."

Obviously this charge assumes that defendant killed his father, a fact which, in the absence of a *judicial admission*, the State must prove beyond a reasonable doubt. The pitfall of such an assumption lies in wait for every trial judge who charges the jury in a case where insanity is pleaded as a complete defense unless the first issue submitted to the jury is whether the defendant killed the deceased. This is a problem to which I called attention in the dissent in State v. Cooper, supra, at 589-590, 213 S.E.2d at 321. In the instant case, however, I think the error could not have prejudiced defendant.

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 437, 212 S.E.2d 113, 122 (1975).

EXUM, Justice, dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 439, 212 S.E.2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

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v.

Ernest John VINSON.

No. 48.

Supreme Court of North Carolina.

June 6, 1975.

Defendant was convicted before the Superior Court, Wilson County, Robert D. Rouse, Jr., J., of rape, and he appealed. The Supreme Court, Huskins, J., held that actions of trial judge in directing nine jurors, whose names had been drawn by deputy sheriff rather than by clerk, to be returned to panel with jury selection to begin anew with both defense and prosecution to have statutorily allotted challenges did not prejudice defendant; that exclusion of certain questions asked prospective jurors on voir dire examination by defendant was not error; that testimony of psychiatrist as to statements allegedly made by defendant that he had no knowledge of crime of rape

was inadmissible hearsay; that defendant's motion for nonsuit was properly overruled; that instructions sufficiently related law of rape to evidence presented; that evidence was insufficient to require charge on insanity or lack of mental capacity; and that imposition of death penalty did not constitute cruel and unusual punishment.

No error.

Sharp, C. J., and Copeland and Exum, JJ., filed opinions dissenting in part.

1. Jury ⇐108

Prospective juror who stated on her voir dire examination that under no circumstances and regardless of evidence would she return verdict of guilty if it meant imposition of death penalty was properly excused for cause in prosecution for rape.

2. Jury ⇐79(1)

Statute prescribing procedure for drawing panel of jurors from jury box at least 30 days prior to court session in which they shall serve had no application to action of trial court in directing nine jurors, whose names had been drawn by deputy sheriff rather than by clerk to determine order for interrogation concerning fitness to serve as jurors, to be returned to panel with jury selection to begin anew. G.S. § 9-5.

3. Criminal Law ⇐1166.16

Action of trial judge in directing nine jurors, whose names had been drawn by deputy sheriff rather than by clerk to determine order of interrogation concerning fitness to serve as jurors, to be returned to panel, names of which had been drawn by clerk or his assistant court deputy as required by statute, with jury selection to begin anew resulted in no prejudice to the defendant. G.S. § 9-5.

4. Criminal Law ⇐1166.16

Trial judge's action in directing nine jurors, whose names had been drawn by deputy sheriff rather than by clerk to determine order of interrogation for fitness as jurors, to be returned to panel with jury selection to begin anew with both defense and prosecution to have statutorily allotted peremptory challenges in addition to any already exercised did not result in prejudicial error by alleged "expansion" of amount of challenges State could exercise. G.S. § 9-21.

5. Jury ⇐79(1)

Trial judge is empowered and authorized to regulate and supervise selection of jury to end that both defendant and State receive benefit of trial by fair and impartial jury.

6. Criminal Law ⇐1134(5)

Ruling of trial judge on questions as to competency of jurors is not subject to appellate review unless accompanied by imputed error of law.

7. Jury ⇐131(2)

While wide latitude is allowed counsel in examining jurors on voir dire, form of questions is within sound discretion of court.

8. Jury ⇐131(15)

On voir dire examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of law are improper and should not be allowed.

9. Jury ⇐131(15)

On voir dire examination of prospective jurors, counsel may not pose hypothetical questions designed to elicit in advance what juror's decision will be under certain state of evidence or upon given state of facts.

10. Jury ⇐131(8)

Defendant's right of inquiry on voir dire examination of prospective jurors as to jurors' beliefs and attitudes concerning capital punishment for crime charged is right to make appropriate inquiry concerning prospective juror's moral or religious scruples, beliefs and attitudes toward capital punishment.

11. Jury ⇐131(17)

On voir dire examination of prospective jurors in prosecution for rape, defendant's question, which was premised on unsupported assumption that "everyone on the jury is in favor of capital punishment and is in favor of that punishment for this offense" and which in addition contained two subquestions dealing with different points of inquiry rendering question inherently ambiguous and totally confusing to prospective jurors, was properly rejected.

12. Jury ⇐131(17)

Where, on voir dire examination of prospective jurors, defense counsel sought to elicit information concerning any circumstance or set of facts which would mitigate juror's views on death penalty in rape case, question could not reasonably be expected to elicit information bearing upon juror's qualifications and consequential challenge for cause and was overly broad for purpose of eliciting information relevant to exercise of peremptory challenge and was therefore properly disallowed.

13. Jury ⇐131(8)

Although in certain cases appropriate inquiry may be made in regard to whether a juror is prejudiced against defense of insanity, trial judge properly exercised discretion in excluding questions by defendant on voir dire examination of prospective jurors in rape case despite defendant's contention that such exclusion denied him right to inquire whether prospective jurors would accept insanity defense.

14. Jury ⇐131(17)

On voir dire examination of prospective jurors in rape case, questions which related to hypothetical circumstances in which defendant "couldn't control his actions," "was not conscious of his act" or "did not intentionally or wilfully commit the act," were manifestly confusing, contained inadequate statement of law, and were therefore properly excluded.

15. Jury ⇐131(17)

Where prospective juror answered question propounded by defense counsel on voir dire examination by indicating that he "didn't know how to answer that question," limitation of further repetitious questions propounded to juror concerning hypothetical defense of insanity was proper in defendant's prosecution for rape.

16. Criminal Law ⇐1166.16

Limitation of questions concerning hypothetical defense of insanity propounded to prospective juror who indicated that he "didn't know how to answer" original question resulted in no prejudice to defendant where such juror did not serve on jury.

17. Witnesses ⇐414(2)

In prosecution for rape, testimony of investigating detective in regard to what victim told him during investigation of incident corroborated previous testimony of victim and was admissible for that purpose.

18. Criminal Law ⇐448(16)

For purposes of determining admissibility of investigating detective's testimony in prosecution for rape, use by victim of word "rape" during investigation did not constitute opinion on question of law.

19. Criminal Law ⇐339

Where victim on direct examination had already made in-court identification of defendant and on cross-examination had given explicit testimony as to pretrial identification in which she identified photograph of defendant, and nothing suggested that pretrial identification was conducted in impermissibly suggestive manner, voir dire examination prior to admission of testimony of investigating detective concerning victim's pretrial identification of such photograph was not necessary.

20. Criminal Law ⇐413(1)

In prosecution for rape, testimony of treating psychiatrist concerning statements allegedly made by defendant, who did not testify in his own behalf, that he had no

knowledge of crime of rape was inadmissible hearsay.

21. Criminal Law ⇐1170(3)

In prosecution for rape, sustaining State's objections during direct examination to questions concerning psychiatrist's opinion as to extent of drug use by defendant did not possibly prejudice defendant where on redirect defendant was allowed to have substantially same question answered.

22. Criminal Law ⇐489

In prosecution for rape, questions and answers on cross-examination by psychiatrist who examined defendant were pertinent to matters covered on direct examination and were therefore admissible.

23. Rape ⇐57(1)

In prosecution for rape, where testimony of prosecuting witness contained plenary evidence tending to show that defendant had intercourse with her by force and against her will, defendant's motion for nonsuit was properly overruled.

24. Rape ⇐59(5)

In a prosecution for rape, law does not require any particular phraseology in stating that defendant had carnal knowledge of complaining witness. G.S. § 14-21.

25. Rape ⇐7

"Sexual intercourse" encompasses actual penetration. G.S. § 14-21.

See publication Words and Phrases for other judicial constructions and definitions.

26. Rape ⇐59(5)

Instructions which, inter alia, defined rape as forcible sexual intercourse with a woman against her will and which by use of term "sexual intercourse" conveyed idea of completed intercourse including actual penetration, sufficiently related law of rape to evidence presented where State's evidence clearly pointed to two completed acts of penetration, complaining witness testified "he actually penetrated me and had intercourse with me," and defense was not grounded on lack of penetration.

27. Criminal Law ⇐824(1)

Although trial court must charge on all substantial features of case which arise upon evidence even absent special request for such instruction, when trial court has aptly instructed on all substantial features of case, defendant desiring more detailed instruction as to any subordinate matter should make appropriate request.

28. Criminal Law ⇐789(4)

In prosecution for rape, instructions on reasonable doubt, which were in substantial accord with charge approved by Supreme Court, were adequate.

29. Criminal Law ⇐46

Evidence of low mentality in itself is not sufficient to raise defense to criminal charge.

30. Criminal Law ⇐814(10)

Where defendant made no formal plea of insanity and there was no evidence tending to show that he was insane or lacked requisite mental capacity to commit charged crime of rape, although defendant presented testimony that he suffered from mental retardation with IQ of 76 and mental age of approximately 15 or 16 years with antisocial personality, charge on insanity or lack of mental capacity was not required.

31. Criminal Law ⇐1213

Imposition of death sentence upon defendant following his conviction of rape did not constitute cruel and unusual punishment.

Defendant was tried upon a bill of indictment, proper in form, charging him with the rape of Norma Coleen Ferguson on 5 December 1973 in Wilson County.

The State's evidence tends to show that on 5 December 1973 Norma Coleen Ferguson was employed at Fiberglass and Sports,

1750 Black Creek Road in Wilson. At 12:45 p. m., defendant entered and said he wanted to look at life preservers. He picked out three or four and led Mrs. Ferguson around to the cash register where she prepared a sales slip. When she looked up and told him the price, defendant was pointing a gun at her head and said, "You scream, I'll kill you." Mrs. Ferguson backed away from the cash register and said, "Take the money." Defendant replied, "Get in the back room." He placed the pistol at her head and backed her into the back room which was used for an office. Then he said, "Get naked!" She pleaded with him to no avail and he cocked the pistol saying, "Get naked or I'll kill you." She removed the bottom part of her pantsuit and defendant raped her twice, first bent across the desk and thereafter on the floor. Between the two acts he held the cocked pistol to her head and forced her to perform an unnatural sex act upon him.

Defendant told Mrs. Ferguson he was going to kill her "at least ten or fifteen times." He prowled around the office opening drawers. He opened the cash register and removed approximately $40.00 from it. He went through her purse, removed a bottle of diet pills and forced her to swallow a handful of them, threatening to kill her because she was swallowing them too slowly. Finally, defendant removed her car keys from her purse, went outside, and drove away in her car.

Police officers were summoned and Mrs. Ferguson told them what had occurred. She was taken to the Wilson Clinic and examined by Dr. Kirkland. This examination showed evidence of recent intercourse and the presence of active sperm in the vagina. Dr. Kirkland stated that Mrs. Ferguson was quite upset, very nervous and distraught, and told him that a black man entered the place where she worked, forced her at gunpoint to perform an unnatural sex act, and raped her; that he forced her to take ten or eleven tablets he found in her pocketbook and thereafter left in her car.

Thomas Edwards, a driver for Roadway Express, arrived at the Fiberglass and Sports place of business on Old Black Creek Road about 1 p. m. on 5 December 1973 to make a delivery. No one was in the sales room but he heard a lady's voice in the office say, "Oh my God, why?" Hearing nothing more, he assumed she had received bad news over the telephone and decided to leave her alone. As he left he heard her say, "I only got a dollar in my pocketbook, all the money is in the cash register." He drove about one-half mile to a telephone and told his supervisor to call "that lady up there at that office" because she either got bad news or was in terrible trouble. The supervisor called, and when Mrs. Ferguson answered the phone she sounded all right. When Mr. Edwards returned to make the delivery, a dark black man stuck his head out and, ascertaining that Mr. Edwards had a piece of freight to deliver, said, "Well, take it around to the back door and we'll take it around there." Mr. Edwards drove his truck to the back gate, found it locked, waited five minutes and left again. Following a second telephone call, and with his suspicions aroused, he returned to the Fiberglass and Sports place of business and found the officers already there. Mr. Edwards identified the defendant as the man he saw on that occasion.

In response to a call, Detective Moore with the Wilson Police Department went to Fiberglass and Sports and found Mrs. Ferguson sitting in a chair crying and sobbing. Her clothing and her hair were in disarray. She said she had been raped by a black man and described him as young, no beard or moustache, with uncombed and unkempt hair but not an Afro, and about as tall and heavy as Detective Moore.

A day or two thereafter, Detective Moore gave Mrs. Ferguson a stack of twelve black and white photographs of black males and requested her to examine them to see if she recognized her assailant from any of the photographs. She took the stack and laid them aside one by one, faceup, "and when she got to the photograph of Ernest John Vinson, she said, 'That's the man.'" Mrs.

Ferguson positively identified defendant as her assailant.

Defendant did not testify. His only witness was Dr. Eugene V. Maynard, a psychiatrist and a former Regional Director of Forensic Psychiatry at Cherry Hospital in Goldsboro. Dr. Maynard testified that he examined and observed the defendant in December 1973 and performed a series of tests, that it was his diagnosis that defendant was suffering from mental retardation, with an IQ of 76 and a mental age of approximately fifteen or sixteen years, and that defendant had an antisocial personality. Dr. Maynard further stated that defendant said he was suffering from drug dependence from all known varieties of drugs. "In a psychiatric evaluation, you largely have to go by what the patient tells you. You don't see him take the drugs."

On cross-examination, Dr. Maynard said: "When I stated that the defendant had antisocial personality, that is a relatively new term. It used to be known as psychopathic personality. The psychopath personality is the type of individual who we feel has a very limited, if any, conscience. They are given to committing acts of an illegal nature without any concern for the consequences, without concern for the present. They have no close ties or affiliations with any other people. They are given to acts of violence off times [sic] without any qualms of conscience or concern for the consequences." With reference to drug addiction, Dr. Maynard stated that while defendant was at Cherry Hospital he showed no signs of drug withdrawal and that it had not been necessary to treat defendant with any type of drugs while he was there. Dr. Maynard had no opinion as to whether defendant was dependent on drugs.

The jury convicted defendant of rape and he was sentenced to death. He appealed to this Court assigning errors noted in the opinion.

Rufus L. Edmisten, Atty. Gen. by Claude W. Harris and Charles M. Hensey, Asst. Attys. Gen., Raleigh, for the State of North Carolina.

Robert A. Farris, Wilson, for defendant-appellant.

HUSKINS, Justice:

[1] A prospective juror stated on her voir dire examination that under no circumstances and regardless of the evidence would she return a verdict of guilty if it meant imposition of the death penalty. She was excused for cause, and defendant assigns error on that ground.

There is no merit in this assignment. The juror was properly excused for cause. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974).

During jury selection the following proceedings were held in chambers with only the defendant and his counsel, the district attorney, the clerk, the court reporter and the judge present:

"After nine (9) jurors had been seated, it was brought to the attention of the Court that some of the names of the jurors from the jury panel drawn at random from a box had been in fact drawn by a deputy sheriff, rather than the clerk. The court directs that all of the jurors who had been seated both by the defendant and the State shall be returned to the panel. All jurors who had been challenged by the State or the defendant are removed from the panel. The trial shall proceed and the selection of the jury shall begin anew, with the defendant to be allowed a total of fourteen (14) challenges, in addition to any challenges heretofore exercised and the State is allowed a total of nine (9) challenges in addition to any challenges heretofore exercised. The clerk is directed to return the names of all the jurors who had been passed by the State and the defendant and all remaining jurors in the original panel to the box to be selected and called at ran-

dom by the clerk. This finding and order was entered in the presence of the defendant and in the presence of his counsel and the solicitor out of the presence of the jury. To the foregoing procedure the defendant through his counsel consents, also the solicitor."

DEFENDANT'S EXCEPTION NO. 3

Defendant assigns the foregoing proceedings as error for that (1) the nine jurors seated had been drawn by a deputy sheriff "in abrogation of N.C.G.S. § 9-5" and (2) the court awarded the State nine challenges in addition to the peremptory challenges it had already exercised, a violation of G.S. § 9-21. Defendant says the statute forbids such an expansion "even by a purported consent."

[2] It should be observed at the outset that G.S. § 9-5 prescribes the procedure for drawing the panel of jurors from the jury box at least thirty days prior to the session of court in which they shall serve. It has no application in the context of this episode.

[3] The quotation above set out is all the record contains concerning this assignment. It is apparent, however, that a jury panel was drawn by the clerk or his assistant or deputy as required by G.S. § 9-5 and that all jurors so drawn had been summoned and had reported for jury duty. Preparatory to selection of a jury in this case the names of the entire panel had been placed on separate scrolls or slips of paper and placed in a hat or box (not the jury box) from which names were drawn at random for interrogation concerning their fitness to serve as jurors. It was this drawing in which some of the names were in fact drawn by a deputy sheriff rather than the clerk. When this fact was brought to the attention of the able trial judge, he, in his discretion, adopted the procedure heretofore set out. We see no error and no prejudice in the action taken.

[4] We find no language in Chapter 9 of the General Statutes which requires the clerk of the court personally, or through an assistant or deputy clerk, to make the random drawing of the names of those on the panel from a hat or box so as to render illegal such drawing by someone else. Be that as it may, the trial judge, in an abundance of caution, nullified the proceedings and started anew, returning to the hat or box from which drawn the names of the nine jurors already accepted by both sides and discarding the names of all jurors already challenged successfully by either party. The judge then announced that defendant would have fourteen peremptory challenges and the State would have nine, the maximum allowed by G.S. § 9-21(a) and (b), completely disregarding any peremptory challenges either the State or the defendant may have exercised theretofore. This demonstration of fairness should be commended, not condemned. State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S.Ct. 143, 38 L.Ed.2d 99 (1973). The record does not disclose how many peremptory challenges, if any, were used by defendant or the State. We perceive no possible prejudice to defendant.

[5] The trial judge is empowered and authorized to regulate and supervise the selection of the jury to the end that both defendant and the State receive the benefit of a trial by a fair and impartial jury. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), rev'd as to death penalty, 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed.2d 859 (1971). Defendant has shown no prejudicial error. This assignment is overruled.

Defendant's second assignment is based on Exceptions Nos. 2, 4, 5, 6, 7, 8, 9, 10 and 11 relating to the voir dire examination of veniremen during the selection of the jury.

The following reproductions serve to illustrate the points defendant seeks to raise:

DEFENSE COUNSEL: "Mr. Jernigan, if it was shown to your satisfaction that the defendant couldn't control his actions and didn't know what was going on at the time of this indictment, would you still be inclined to return a verdict which

would cause the imposition of the death sentence?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 2

DEFENSE COUNSEL: "Now, as I understand it, everyone on the jury is in favor of capital punishment and is in favor of that punishment for this offense. Now, is there anyone on the jury, because of the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved, is there anyone on the jury who feels that they would be in favor of sentence other than death for the offense of rape?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 4

DEFENSE COUNSEL: "Now, is there, Mrs. Rouse, can you think of any circumstance or any set of facts in which a defendant is charged and convicted of rape, that you would not be in favor of the death penalty?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 5

DEFENSE COUNSEL: "If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a verdict of guilty?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 6

DEFENSE COUNSEL: "Well, if you are satisfied from the evidence, that a person did not intentionally or wilfully commit the act in question, would you still return a verdict, if you were satisfied from the evidence, beyond a reasonable doubt, that the act was committed, would you still return a verdict of guilty knowing that the sentence would be a mandatory death sentence?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 7

DEFENSE COUNSEL: "Well, in other words, Mr. Ash, are you saying that even if you are satisfied that the defendant did not know right from wrong, you might still return a verdict that would cause him to be sentenced to the gas chamber?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 8

DEFENSE COUNSEL: "Well, Mr. Ash, if you are satisfied from the evidence, that at the time of the purported offense, that the defendant did not know right from wrong, would you still return a verdict of guilty, knowing as you now know what the punishment would be?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 9

COURT: "He has answered the question. Isn't that true, sir, that you said you didn't know how to answer that question?"

DEFENDANT'S EXCEPTION NO. 10

DEFENSE COUNSEL: "Mr. Ash, is there any reason that hasn't been asked of you, why you would not give the defendant the benefit of the rule that would require him to know right from wrong before he would be guilty?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 11

Defendant states in his brief that Exceptions Nos. 4 and 5 "involve a question, first to the entire panel, and then to an individual juror as to their beliefs and attitudes concerning capital punishment for the crime charged. The remainder of the questions to which his Honor sustained objections by the solicitor involved defendant's effort to perceive whether prospective jurors would accept an insanity defense." Defendant contends the inquiries were proper for those purposes and exclusion of them by the court constitutes prejudicial error.

[6] "In selecting the jury, the court, or any party to an action, civil or criminal, has the right to make inquiry as to the fitness and competency of any person to serve as a

juror." State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969). We pointed out in *Allred* that the voir dire examination of jurors has a double purpose: (1) to ascertain whether grounds exist for challenge for cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. "The presiding judge shall decide all questions as to the competency of jurors." G.S. § 9-14 (1969). His ruling on such questions is not subject to appellate review unless accompanied by some imputed error of law. State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S.Ct. 143, 38 L.Ed.2d 99 (1973).

We said in State v. English, 164 N.C. 498, 80 S.E. 72 (1913): "The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the state, to pick a jury, but to secure an impartial one." Challenges for cause are without limit if cause is shown, while peremptory challenges may be exercised within the limits allowed by law. State v. McKethan, 269 N.C. 81, 152 S.E.2d 341 (1967).

[7] While a wide latitude is allowed counsel in examining jurors on voir dire, the form of the questions is within the sound discretion of the court. "In this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. [Citation omitted.] The overwhelming majority of the states follow this rule." State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 987, 93 S.Ct. 1516, 36 L.Ed.2d 184 (1973); *accord*, State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

[8, 9] On the voir dire examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. 47 Am.Jur.2d, Jury, § 203 (1969); *see* Christianson v. United States, 280 F. 962 (6th Cir. 1923); Sherman v. William M. Ryan & Sons, Inc., 126 Conn. 574, 13 A.2d 134 (1940); Pope v. State, 84 Fla. 428, 94 So. 865 (1922); State v. Henry, 197 La. 999, 3 So.2d 104 (1941); State v. Pinkston, 336 Mo. 614, 79 S.W.2d 1046 (1935); State v. Bryant, supra; State v. Huffman, 86 Ohio St. 229, 99 N.E. 295 (1912).

Types of questions which have been considered improper include "those asking a juror what his verdict would be if the evidence were evenly balanced; if he had a reasonable doubt of a defendant's guilt; if he were convinced beyond a reasonable doubt of a defendant's guilt; or questions asking him whether he would, in a specified hypothetical situation, vote in favor of the death penalty. . . . Also, it has been considered improper to ask jurors hypothetical questions concerning issues, especially certain criminal defenses, which may never be raised at the trial." 47 Am.Jur.2d, Jury, § 203 (1969); *see* Proctor v. People, 101 Colo. 163, 71 P.2d 806 (1937); Commonwealth v. Calhoun, 238 Pa. 474, 86 A. 472 (1913); Annot., Jury—Voir Dire—Hypothetical Question, 99 A.L.R.2d 7, 23, § 4[a] (1965).

In State v. Jackson, 284 N.C. 321, 200 S.E.2d 626 (1973), the Court held that the trial judge properly sustained the State's

objection to the following question asked by defendant's counsel: "I ask you now collectively if you find from the evidence relating to any or all the facts in this case, in view of all the evidence, that it is susceptible of two reasonable interpretations, that is, one leading to his innocence and one leading to his guilt, I will ask you now if you will adopt that interpretation which points to innocence and reject that of guilt?" There, Justice Branch, speaking for the Court, said: "The hypothetical question posed in instant case could not reasonably be expected to result in an answer bearing upon a juror's qualifications. Rather it could well tend to commit, influence or ask the jury for a decision in advance of hearing all of the testimony." *See also* State v. Bryant, supra; State v. Washington, 283 N.C. 175, 195 S.E.2d 734 (1973), cert. denied, 414 U.S. 1132, 94 S.Ct. 873, 38 L.Ed.2d 757 (1974).

[10] In applying the foregoing principles to this case, we first focus on Exceptions Nos. 4 and 5 relating to the jurors' "beliefs and attitudes concerning capital punishment for the crime charged." The defendant's right of inquiry in this regard is the right to make *appropriate* inquiry concerning a prospective juror's moral or religious scruples, beliefs and attitudes toward capital punishment. State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974). "The extent of the inquiries, of course, is subject to the control and supervision of the trial judge." State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

[11] With reference to Exception No. 4, we first note the question was premised on the statement that "everyone on the jury is in favor of capital punishment and is in favor of that punishment for this offense." Such an assumption is not supported by the record before us. Secondly, the question contains two subquestions dealing with different points of inquiry. This form makes the question inherently ambiguous and totally confusing to prospective jurors. Therefore, the question was properly rejected.

[12] In regard to Exception No. 5, defense counsel sought to elicit information concerning *any* circumstances or set of facts which would mitigate the juror's views on the death penalty in a rape case. The question could not reasonably be expected to elicit information bearing upon the juror's qualifications and a consequential challenge for cause, and was overly broad for the purpose of eliciting information relevant to the exercise of a peremptory challenge. No prospective juror should be required to answer questions of such scope and generality. State v. Washington, supra. The question exceeded the bounds of propriety and was properly disallowed.

[13] Defendant further contends that the exclusion of the questions noted by Exceptions Nos. 2 and 6-11 denied him the right to inquire "whether prospective jurors would accept an insanity defense." While in certain cases appropriate inquiry may be made in regard to whether a juror is prejudiced against the defense of insanity, we have carefully reviewed defendant's contentions under the circumstances here presented and find that the trial judge properly exercised his discretion. *See* United States v. Cockerham, 155 U.S.App.D.C. 97, 476 F.2d 542 (1973); Annot., Jury—Voir Dire—Hypothetical Question, 99 A.L.R.2d 7, 23 n. 15 (1965); Annot., Juror—Prejudice Against Defense, 112 A.L.R. 531 (1938).

[14] With reference to Exceptions Nos. 2, 6 and 7, we note the questions relate to hypothetical circumstances in which defendant "couldn't control his actions," "was not conscious of his act" or "did not intentionally or wilfully commit the act." The law relating to and distinguishing the defense of insanity and the defense of unconsciousness has been fully discussed by this Court in State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975), and State v. Caddell, N.C., — S.E.2d — (1975). Suffice it to say that the questions propounded by defense counsel here were manifestly confusing, contained inadequate statements of the law,

and were properly excluded. State v. Bryant, supra.

[15] Exceptions Nos. 8, 9 and 11 relate to the examination of Mr. Ash, a prospective juror who, for reasons which this record fails to disclose, was not a member of the jury finally empaneled. The remaining exception, No. 10, concerns the trial court's statement that Mr. Ash had answered the question propounded by defense counsel. Nothing else appears in the fragmentary record concerning the examination and answers of this prospective juror. We assume the trial court was correct in its observation that the juror had indicated he "didn't know how to answer that question." That being the case, the trial court properly refused further repetitious questions concerning the hypothetical defense of insanity. State v. Bryant, supra; Grizzell v. State, 164 Tex.Cr.R. 262, 298 S.W.2d 816 (1956).

[16] Moreover, since Mr. Ash did not serve on the jury in this case, we perceive no possible prejudice to defendant. The record does not show why or at whose instance he was excused. Lack of prejudice is further accentuated by the fact that the evidence offered at the trial was wholly insufficient to raise the defenses of insanity or unconsciousness and require the trial judge to charge the jury on legal principles applicable thereto.

We find no merit in any of the exceptions upon which defendant's second assignment is based. The assignment is therefore overruled.

In his next contention, based on assignments three, four and six, defendant argues the trial court erred in admitting improper evidence over his objection and in excluding competent evidence elicited by him at trial.

[17-19] Assignments three and four, relating to the testimony of Detective Moore, are patently without merit. The testimony of this witness in regard to what Mrs. Ferguson had told him during his investigation of the incident clearly corroborates the previous testimony of Mrs. Ferguson and was admissible for that purpose. State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972); State v. Rose, 251 N.C. 281, 111 S.E.2d 311 (1959). Furthermore, it is settled that Mrs. Ferguson's use of the word "rape" during that investigation did not constitute an opinion on a question of law. State v. Sneeden, 274 N.C. 498, 164 S.E.2d 190 (1968). Similarly, there is no merit to the argument that the trial court erred in admitting *without a voir dire examination* the testimony of this witness concerning Mrs. Ferguson's identification of a photograph of defendant prior to trial. Mrs. Ferguson on direct examination had already made an in-court identification of defendant and on cross-examination she gave explicit testimony of the pretrial identification, all without objection or a request for a voir dire examination. Moreover, there is nothing whatever in the record suggesting this pretrial procedure was conducted in an impermissibly suggestive manner. Under these circumstances a voir dire examination was not necessary, especially since one was not requested at the time objection was made to the testimony of Detective Moore. State v. Cook, supra; State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, cert. denied, 400 U.S. 946, 91 S.Ct. 253, 27 L.Ed.2d 252 (1970).

Assignment six is based upon five exceptions, Nos. 16-20, to the trial court's rulings on certain aspects of Dr. Maynard's testimony.

[20] Exception No. 16 is directed to the trial court's action in sustaining the State's objection to the following question: "At any time in your conference with him, did the defendant indicate any knowledge to the crime for which he has been charged?" Out of the presence of the jury Dr. Maynard testified that defendant professed no knowledge of any crime of rape. Defendant does not disclose the relevancy of this inquiry and we do not perceive any legitimate purpose. The question called for inadmissible hearsay and the doctor's answer, stating what defendant had declared after

he had been charged with this crime, was of that nature. Defendant did not take the stand and his self-serving declarations to the doctor were not admissible for any purpose. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972). The State's objection was properly sustained.

[21] Exceptions Nos. 17 and 18 relate to the trial court's action in sustaining the State's objections during direct examination to questions concerning Dr. Maynard's opinion as to the extent of drug use by defendant. Our perusal of the record indicates that on redirect examination defense counsel was permitted to ask Dr. Maynard if he had an opinion "whether or not the defendant was dependent on drugs?" In response thereto the witness answered: "I have no opinion. I have a copy of a report on Ernest Vinson. On page 3, number 3, under diagnosis it reads 'drug dependence, all known varieties.' This is the current diagnosis." Even assuming error on direct examination, which we do not concede, we perceive no possible prejudice since substantially the same question was asked and answered on redirect.

[22] We find no merit in Exceptions Nos. 19 and 20 which deal with answers of the doctor on cross-examination to questions concerning the course of treatment of defendant. The questions and answers were pertinent to matters covered on direct examination and were obviously admissible. State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946); State v. Perry, 210 N.C. 796, 188 S.E. 639 (1936).

Assignments three, four and six, therefore, are overruled.

[23] In assignment five defendant contends the trial court erred in denying his motion as of nonsuit at the close of the State's evidence. We find no merit in this assignment. The testimony of the prosecuting witness contains plenary evidence which tends to show, when taken in the light most favorable to the State, that defendant had intercourse with her by force and against her will. Accordingly, defendant's motion as of nonsuit was properly overruled. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. [illegible]rnold, 284 N.C. 41, 199 S.E.2d 423 (1973).

The seventh assignment, based on Exceptions Nos. 22 through 25, asserts error by the trial court in instructing the jury.

Defendant's Exception No. 22 is that the trial court failed to define the term "sexual intercourse" and thus failed to charge that rape requires penetration by the male organ. The court charged: "Rape is forcible sexual intercourse with a woman, against her will. For you to find the defendant guilty of rape, the State must satisfy you from the evidence and beyond a reasonable doubt of three things: First, that the defendant, Ernest John Vinson had sexual intercourse with the alleged victim, Norma Coleen Ferguson," etc.

[24, 25] The law defines rape as the carnal knowledge of a female person by force and against her will. G.S. § 14-21 (1969); State v. Armstrong, 287 N.C. 60, 212 S.E.2d 894 (1975). "The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male." State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958). In this respect the law does not require any particular phraseology in stating that the defendant had carnal knowledge of the complaining witness. State v. Hodges, 61 N.C. 231 (1867). Accordingly, in State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950), this Court held that testimony of a complaining witness that defendant had "intercourse" with her was sufficient to warrant a finding by the jury that there was penetration of her private parts. *Accord*, State v. Hardee, 6 N.C. App. 147, 169 S.E.2d 533 (1969). It necessarily follows that the term "sexual intercourse" encompasses actual penetration. Williams v. State, 92 Fla. 125, 109 So. 305

(1926). Teynor v. State, 47 Ohio App. 149, 191 N.E. 372 (1933).

[26, 27] We are of the opinion that the instructions sufficiently relate the law of rape to the evidence presented. Here, all the State's evidence clearly points to two completed acts of penetration. The complaining witness testified "he actually penetrated me and had intercourse with me." There was no evidence to the contrary. Although defendant's plea of not guilty required the State to prove penetration beyond a reasonable doubt, the defense was not grounded on lack of penetration. Under these circumstances, the term "sexual intercourse" conveyed the idea of completed intercourse, including actual penetration, and the jury must have so understood. Moreover, the Court asked defense counsel if the instructions were satisfactory and counsel replied "quite" and indicated no corrections or additions were necessary. If he desired further elaboration on the term "sexual intercourse" he should have so requested at that time. Of course the trial court must charge on all substantial features of a case which arise upon the evidence even absent a special request for such instruction. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974); State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974). Conversely, when the trial court has aptly instructed on all substantial features of the case, a defendant desiring a more detailed instruction as to any subordinate matter should make an appropriate request. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944); State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935); State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924).

[28] Exception No. 23, directed to the trial court's failure to instruct the jury to consider the "lack of evidence" as well as the evidence in the case, is without merit. Defendant cites State v. Hammonds, 241 N.C. 226, 85 S.E.2d 133 (1954), and State v. Tyndall, 230 N.C. 174, 52 S.E.2d 272 (1949), in support of this exception. Both of those cases stand for the proposition that when the court undertakes to define the term "beyond a reasonable doubt," the definition must be in substantial accord with those approved by this Court. In this case the trial court's instructions on reasonable doubt were in substantial accord with the charge which we approved in State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970). Here, as in *Gaiten*, the evidence was not circumstantial, but was direct and amply sufficient to support the verdict. Accordingly, *Gaiten* controls and the court's instructions as to reasonable doubt were adequate under our decision in that case. *See also* State v. Britt, 270 N.C. 416, 154 S.E.2d 519 (1967).

[29, 30] In Exceptions Nos. 24 and 25 defendant argues the court did not charge "on the required mental capacity to commit a criminal offense" or "on the legal consequences if the jury found that the defendant did not know right from wrong at the time of the alleged offense." A request for the desired instructions does not appear in the record. Moreover, defendant did not make a formal plea of insanity and there is no evidence in the record tending to show that he was insane or lacked requisite mental capacity to commit the crime. Evidence of low mentality in itself is not sufficient to raise a defense to a criminal charge. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S.Ct. 599, 24 L.Ed.2d 518 (1970). Under these facts there was insufficient evidence to require a charge on insanity or lack of mental capacity, and there was no error in the court's failure to do so. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Melvin, 219 N.C. 538, 14 S.E.2d 528 (1941); State v. Miller, 219 N.C. 514, 14 S.E.2d 522 (1941).

This assignment is overruled.

[31] Finally, defendant contends that imposition of the death penalty in this case constitutes cruel and unusual punishment. This contention has heretofore been considered and determined to be without merit

on various cases. State v. Vick, 287 N.C. 37, 213 S.E.2d 335 (1975); State v. Armstrong, 287 N.C. 60, 212 S.E.2d 894 (1975), and cases cited therein. Therefore, defendant's eighth assignment based on this contention is overruled.

After careful review of all assignments, we find no prejudicial error in the trial. The verdict and judgment must therefore be upheld.

No error.

SHARP, Chief Justice, dissenting as to the death sentence:

The rape for which defendant has been convicted occurred on 5 December 1973, a date during the period between 18 January 1973, the day of the decision in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. § 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated in the dissenting opinion in State v. Jarrette, 284 N.C. 625, 666 et seq., 200 S.E.2d 721, 747 et seq. (1974), I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment.

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 437, 212 S.E.2d 113, 122 (1975).

EXUM, Justice, dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 439, 212 S.E.2d 113, 121 (1975).

Application of CAMPSITES UNLIMITED, INC.

No. 50.

Supreme Court of North Carolina.

June 6, 1975.

Landowner sought certiorari, objecting to a board of adjustments' denying him permission to continue his camping development as a nonconforming use after the enactment of a zoning ordinance. The Superior Court, Stanly County, Seay, J., affirmed the board's order, the Court of Appeals, Vaughn, J., reversed, 23 N.C.App. 250, 208 S.E.2d 717, and the county appealed. The Supreme Court, Lake, J., held that where the landowner began development of his property as campsites, did substantial work thereon and made expenditures or obligations in excess of $250,000, and during that time landowner had only general knowledge that county commissioners were studying zoning plans but had no knowledge of any specific plan for his property, campsite development was existing nonconforming use when zoning ordinance was enacted, notwithstanding county's contention that landowner demonstrated bad faith by stating several months after development was begun that he was aware that zoning "had been in planning stage for a year or so" and that he was "trying to beat it."

Affirmed.

1. Zoning ⇨702

Upon superior court review of order of board of adjustments, findings of fact made by board, if supported by evidence introduced at hearing before board, are conclusive.

2. Zoning ⇨745, 749

On appeal of superior court's order affirming action of board of adjustments, Su-

Appendix B

Pp. 11-51, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four contemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected in the State of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6 / Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7/] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 298 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("In view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W.2d 618 (1972); People v. Murphy, 8 Cal. 3d 369, 105 Cal. Rptr. 138, 503 P.2d 594 (1972); State v. Aillen, ___Conn.___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 284, 287 N.E. 2d 609 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___Ind.___, 284 N.E.2d 757 (1972); State v. Randol, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 256); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholmey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___Mass.___, 299 N.E.2d 719 (1973); Cupler v. State, ___Miss.___, 268 So. 2d 338 (1972) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in this state is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martineau and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 554 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8] The statutes vary widely in their terms and forms, and consequently vary

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7/ cont'd the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19; 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972). ("The effect of [Furman] . . . is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(I) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); La. Code

somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding: some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 5-8-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4713 Fla. Stat. §§ 782.01, 794.01, 792.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution.[9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row,[10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder[11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974)(rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974)(rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 168 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. The North Carolina Supreme Court commented on the legislative intent indicated by the 1949 measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 28-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974. 13/

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, Del.__, 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment, State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971)(alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non vult (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties. 15/ That

15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also finds that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs." The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that evade the rule of law or subvert the ordinary protections afforded by its regularity and generality.

Due Process of Law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "[T]he terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Dent v. West Virginia, 129 U. S. 114, 123 (1888).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

"The essence of [the] . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules.[20] So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country;[21] but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle,[22] Ladner v. United States, 358 U. S. 169 (1958); and this Court's

20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

21/ But see Ashton v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26] The form of those

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26/ The concurring Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 442 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory" system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute), or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Pillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ___, ___S.E.2d ___; N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, ___ N.C. ___, 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12551 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-46179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35548 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974) State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22457 (February 5, 1974); State v. McCall, Transylvania County Superior Ct., Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Bertie County Superior Ct., No. 73-Cr-2247 (February 17, 1974);

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Casey, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

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28/ cont'd.

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974);

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, for rape or assault to rape. He may thus "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions 29/ for

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29/ State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 47 convictions for First Degree Burglary (with 15 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33/] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Bertie County Superior Ct., No. 73-Cr-2383, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilty pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . .there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 384, 391, 103 S.E.2d 452, 456 (1958) (quoting State v. Spivey, 151 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Roseman, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses [36/] because the trial court failed to give a charge on second degree murder, [37/] voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 284 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Danny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923). See also, State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 840 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 151 N.C. 731, 66 S.E. 567 (1909). Accord: State v. Rose, 155 N.C. 436, 71 S.E. 332, 337 (1911); See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[He may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal jutice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment. 44/ A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties. 45/ By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Behre notes that while 64 percent of condemned persons escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38 percent for the period between 1949 and 1962. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibition of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-326 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher"[46/] even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments,[48] a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.[51]

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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50/ (Cont'd)

ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. 52/ Increased respect for

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51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death. 53/

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe tol'.

As the California Supreme Court has pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

Appendix C

Pp. 19-22, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974).

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

The remaining Eighth Amendment issue presented by this case is whether the death penalty is an excessive, disproportionate and aberrational punishment for the crime of rape when that crime results in no considerable bodily injury. The question is one on which a conflict apparently exists between the North Carolina Supreme Court and the cognizant federal Court of Appeals. See Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970) cert. denied 408 U.S. 942 (1972).

Restraints upon excessive punishment run deep in the Anglo-American tradition,[13/] and their expression in the Eighth Amendment was a principal ground of decision in Weems v. United States, 217 U.S. 349 (1910). Although the punishment involved in Weems was peculiar and outlandish in nature, condemnation of it rests expressly upon the oppressiveness of that punishment for the crime of falsifying public records, and its consequent lack of "adaptation of punishment to the degree of crime." 217 U.S. at 365. See also O'Neil v. Vermont, 144 U.S. 323, 337, 339-340 (1892) (Justice Field dissenting);[14/] Hart v. Coiner, 483

13/ Magna Carta contains three chapters requiring that amercements be proportioned to the measure of magnitude of offenses. MAGNA CARTA, ch. 20-22 (1215), printed in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY (1926) 42,45.

14/ Justices Harlan and Brewer agreed with Justice Field that O'Neil's long jail sentence was excessive "in view of the character of the offences committed," 217 U.S. at 366, 371, which were liquor law violations. The majority of the Court declined to reach the merits of the question because it was not properly presented and because the Eighth Amendment was not then viewed as a restraint upon the States. 217 U.S. at 331-332.

F.2d 136, 139 (4th Cir. 1973), cert. denied, ____ U.S. ____, 39 L.Ed.2d 881 (1974)

This constitutional requirement of adaptation is not Procrustean: it does not command a commensurability of crime and punishment that neither legislatures nor courts, nor the sciences of penology, are sufficiently informed to calibrate. See Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1078-1080 (1964). However, it would ignore the entire experience of our criminal law system to deny that the grading of offenses by their seriousness is endemic to it; and, in this context, the Eighth Amendment's prohibition of cruel and unusual punishments must impose some restriction upon the power of a State to proceed aberrantly in affixing maximum penalties to grades of crime.

In assessing the death penalty for rape as that penalty was reinstituted in North Carolina by State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), this Court is not left without compelling benchmarks. For the fact is that such a punishment today is aberrant in the farthest extreme. Rape is everywhere regarded as a serious offense, but it is punished by death in only four countries outside the United States: Taiwan, Zambia, Malawi, and the Republic of South Africa.[15/] Prior to the

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15/ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968), pp. 40, 86. This survey was based upon responses received from governments or "national [United Nations] correspondents" in 109 countries and colonies. Ibid. at 4-5.

Furman decision, sixteen American States and the federal government authorized a discretionary death penalty for rape.[16] However, as of June 1, 1974, only Georgia,[17] North Carolina,[18] and perhaps Louisiana[19] impose the death penalty for the rape

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16/ 18 U.S.C. §2031 (1971); Ala. Code, tit. 14 §395 (Recomp. Vol. 1958); Ark. Stat. Ann. §41-3403 (Supp. 1969); Fla. Stat. Ann. §794.01 (1965); Ga. Code Ann. §26-2001 (1969); Ky. Rev. Stat. Ann. §435.090 (1969); La. Rev. Stat. Ann. §14:42 (1950) and La. Code of Crim. Proc., Art. 817 (1971); Md. Code Ann., art. 27, §461 (Repl. vol. 1967); Miss Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Ann. Mo. Stat. §559.260 (1953); Nev. Stat. §§200.363, 200.400 (1968); N.C. Gen. Stat. §14-21 (Repl. Vol. 1969); Okla. Stat. Ann., tit. 21, §1115 (Supp. 1970); S.C. Code Ann. §16-72 (1962); Tenn. Code Ann. §39-3702 (1955); Vernon's Tex. Pen. Code Ann., art. 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960).

17/ No. 74, Ga. 1973 Sess. Laws, at 164-165, amending Ga. Code §27-2534.1.

18/ North Carolina's new capital punishment legislation imposes the death penalty for "first degree rape," defined as rape accomplished through use of a deadly weapon or attended by "serious bodily injury" or a rape where the defendant is over sixteen years of age and the victim is "a virtuous female child under the age of twelve years." N.C. Gen. Stat. §14-21, as amended by Sec. 2, Chap. 1201, 1973 N.C. Sess. Laws.

19/ State v. Selman, La. Sup. Ct. No. 54376 (June 10, 1974) (the time to seek rehearing has not expired as of the date of the filing of this petition for certiorari. See La. Sup. Ct. Rule IX, § 1).

of an adult woman, while two other States make certain rapes of children capital.[20] Eleven of the sixteen States that punished rape with death before Furman have now abandoned the death penalty entirely for this crime.[21] And the North Carolina General Assembly itself, acting after the affirmance of petitioner's death sentence, has ceased to use death to punish the wide range of rape offenses made capital by the State's Supreme Court in Waddell.

20/ The new Florida statute imposes the death penalty for rape if the victim is under 11 years old and the defendant is 17 or older. Fla. Stat. §921.141 (1972). The new Tennessee statute imposes the death penalty for rape, if the victim is under twelve years of age. Tenn. Code §39-2402, as amended by Pub. Chap. 462, Tenn. Laws 1974.

21/ Arkansas, Kentucky, Mississippi, Nevada, Oklahoma, and Texas have enacted new death penalty statutes that do not make rape a capital crime. Alabama, Missouri, Maryland, South Carolina, and Virginia have not enacted any death penalty legislation after Furman.

Appendix D

Lampkins v. State of North Carolina
In The Supreme Court of The United States
(Pending)

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" sections, respectively, of the Petitioner for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B, infra), and of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974), at 19-22 (attached as Appendix C, infra). On October 29, 1974, this Court granted certiorari in Fowler v. North Carolina, No. 73-7031, to consider a similar question.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF TWO VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Test of Exclusion Applied by the Court Below Did Not Meet the Minimum Standards Required by the Constitution as Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

The record below[10/] presents important questions concernin

10/ The transcript of jury selection is not part of the trial transcript or of the Record on Appeal. The trial court ordered it transcribed on May 30, 1974, after the Record on Appeal had been prepared and filed, and it was consecutively paginated from 1 to 74; this transcript will hereinafter be cited as "Jury Sel. T.".

the constitutionality of excluding persons who oppose capital punishment from service on trial juries in capital cases tried under a purportedly "mandatory" death-sentencing procedure. During the selection of petitioner's jury, the State was permitted to challenge for cause two veniremen because of their expression of conscientious scruples against the death penalty. These exclusions raise literally vital issues under Witherspoon v. Illinois, 391 U.S. 510 (1968), because that decision established in capital cases a clear and unequivocal prohibition against excluding veniremen for cause on account of their conscientious or religious scruples against the death penalty except under narrow and carefully defined circumstances:

> "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

391 U.S. at 522 (footnote omitted). See also Maxwell v. Bishop, 398 U.S. 262, 266(1970); Boulden v. Holman, 394 U.S. 478, 482 (1969); Mathis v. New Jersey, and companion cases, 403 U.S. 946-948 (1971); Marion v. Beto, 434 F.2d 29, 32 (CA5 1970). Exclusions for cause were to be countenanced only where veniremen had made "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21 (emphasis in original).

This Court should determine whether the equivocal statements made by the two excluded veniremen in their voir dire examinations in this case met the constitutional standards of Witherspoon.[11/] It should also determine whether scruples against the imposition of capital punishment in all circumstances can be made "unmistakably clear," as required by Witherspoon, supra, 391 U.S. 522 n.21, in the absence of an instruction by the trial court

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11/ Venireman Richard J. Godfrey was excluded on the basis of the following examination (Jury Sel. T. 10-14):

"Q. [The Solicitor] Mr. Richard J. Godfrey, do you have any religious or conscientious scruples against capital punishment?
A. You mean by that, the death penalty?
Q. Yes, sir.
A. Yes, I do.
Q. You do have some?
A. Yes, sir.
THE SOLICITOR: I think we need the Judge present before I could proceed any further.
Q. Mr. Godfrey, it is my understanding that you answer that you are in principle opposed to capital punishment, is that correct?
A. Yes, sir.
Q. And do you think that your opposition to capital punishment would prevent you from making an impartial decision as to whether a defendant was guilty of rape?
A. Not for that, no, I don't believe so.
THE COURT: I can't hear you.
A. No, I don't think so.
[Jury Sel. T. 11]
Q. (The Solicitor continuing:) And are you saying that despite your opposition to capital punishment you could set aside your personal convictions against capital punishment and decide the guilt of the defendant on rape solely upon the evidence that is presented in this case?
A. Yes, but I would be against the death penalty.
Q. All right. Well, I take it, Mr. Godfrey -- there are a certain amount of questions the Supreme Court asks me to ask jurors in going down this, but I will just cut through them and ask you in this way: What we are asking of the jurors is, your principle against capital punishment, the fact that you don't particularly think that it is necessary, do you think that would affect your decision when you went back in the Jury Room with the other eleven jurors to such an extent that you

that it is the civic duty of each venireman to sit as a juror if

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11/ cont'd.

couldn't find a man guilty even though you believed that the State had presented evidence to you beyond a reasonable doubt of his guilt?

A. (No answer).

Q. What I am asking you, in effect, is: Would it affect your judgment when it came right down to whether he was guilty or not?

A. No, it would not.

Q. It would not. So, what you are saying is: even though you are opposed to it, you don't think it would affect

[Jury Sel. T. 12]

your verdict one way or the other in this particular case? If you thought the evidence showed beyond a reasonable doubt that Mr. Lampkins was guilty of rape on the 13th of November against Rosa Mae Barr, then you could find him guilty?

A. Yes. Can I clarify it somewhat?

Q. Yes, sir.

A. Now, in the Jury Room we don't determine whether a person gets life or death?

Q. That is absolutely correct.

A. That is entirely up to the Judge; right?

Q. Yes, sir.

A. No, I don't think I could, really.

Q. What do you mean, you don't think you could?

A. I don't think I could judge impartially on that basis.

Q. In other words, you don't think that you could give an impartial verdict knowing there is some possibility ---

A. Right.

Q. ---he could get capital punishment?

A. Yes.

THE SOLICITOR: If your Honor please ---

THE COURT: Let's see. Both Mrs. Kennedy [defense counsel] and you both let's come up and let's see if we can eliminate this sort of thing.

(The Court conferred with counsel at the Bench.)

[Jury Sel. T. 13]

THE SOLICITOR: I would again challenge this juror.

THE COURT: Let's ask him definitely what he would return, if he would not.

THE SOLICITOR: All right, sir.

Q. (The Solicitor continuing:) I am required to ask one further question of you, Mr. Godfrey, and that is: I take it that your answer is that you would automatically find the defendant not guilty of rape in this case before you without regard to any evidence that might develop during the trial because of your

he possibly can. As the Court declared in Boulden v. Holman, supra

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11/ cont'd.

principles against capital punishment?

A. No; I think I had rather not be in a position to do that. That wouldn't be fair.

THE COURT: Well, that is not the question, whether you had rather. I don't suppose anybody wants to sit on the jury.

A. Right. Well, could I just disqualify myself?

THE COURT: Can you what?

A. Disqualify myself?

THE COURT: No, you can't do that.

A. All right, sir.

BY THE COURT TO MR. GODFREY:

Q. You say you have some opposition, or are opposed, to capital punishment. I did not hear what you said about on what grounds.

[Jury Sel. T. 14]

A. I don't think, you know, the State has the right to take someone's life.

Q. Well, based upon what? Just your belief about it, or personal opinion, or what?

A. Yes.

Q. Religious, or moral, or what is it?

A. Moral.

Q. So, no matter what the evidence is and what the proof was, you would not return a verdict of guilty of rape, which would carry the death penalty, regardless of what the evidence was?

A. Yes. That's right.

THE COURT: All right.

THE SOLICITOR: I again make a motion to challenge for cause, Your Honor.

THE COURT: All right, I will excuse him. All right, you can stand aside."

Venireman Lorraine Edwards was excluded on the basis of the following examination (Jury Sel. T. 62-64):

"Q. [the Solicitor] Do you know anything about this case that you think would affect your judgment, one way or the other?

A. [Venireman Lorraine Edwards] No.

[Jury Sel. T. 63]

Q. Mrs. Edwards, this case does involve capital punishment. At this time, I'd like to ask you: Are you opposed to capital punishment?

394 U.S. at 483-484; "[i]t is entirely possible that a person who

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11/ cont'd.

A. I do not believe in capital punishment.
Q. You do not believe in it?
A. No.
Q. Would your opposition to capital punishment affect your judgment in this particular case?
A. Yes.
Q. And your verdict?
A. Yes, it would.
Q. You think it would?
A. Yes, it would.
Q. And are you saying, in effect, that if the State presented evidence which you thought beyond a reasonable doubt proved that Mr. Lampkins did commit this crime, that you think capital punishment would have a bearing even in the face of that?
A. Yes. Yes, sir.

THE SOLICITOR: Your Honor ---

THE COURT: I did not hear all she said. Are challenging her for cause?

THE SOLICITOR: Yes, sir, I am, Your Honor.

THE COURT: Do you make any point about it?

MRS. KENNEDY: No, Your Honor.

[Jury Sel. T. 64]

THE COURT: All right, I will excuse you."

It is immaterial that petitioner raised no contemporaneous objection to the exclusion of these two veniremen, since "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (emphasis added). Jury selection in violation of the Witherspoon requirement "necessarily undermines 'the very integrity of the . . . process'" leading to imposition of the death sentence, id. at 523 n.22, and this Court has permitted attacks upon numerous death sentences despite the lack of contemporaneous objection to for-cause challenges that violated Witherspoon. See, e.g., Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Wigglesworth v. Ohio, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947(1971). Significantly, the lower court decisions reversed in the latter two cases had held Witherspoon error waived because of the absence of timely objection. State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969); Harris v. State, 457 S.W.2d 903 (Tex. Cr. App. 1970).

has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A venireman must be instructed that the law requires him to "subordinate his personal views to what he . . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, at 391 U.S. 514-515 n.7. Although the excluded veniremen here stated, without more, that their attitude toward the death penalty might affect their decision as to petitioner's guilt, neither of them was given any instruction on their duty to attempt to serve as a juror or asked whether they could subordinate their initial instincts to the law of North Carolina that the trial court would charge them to obey.

B. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of His Sixth Amendment Right to a Representative Jury.

In order to avoid subjecting the Court to redundant argument, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975) at 72-78 (attached as Appendix D, infra).

Appendix D

Pp. 72-78, Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975).

the accused of a jury that is "truly representative of the community," Smith v. Texas, supra; see Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970) -- is violative of petitioner's right to equal protection and due process.

C. The Exclusion of a Venireman with Conscientious Scruples Against Capital Punishment Deprived Petitioner of his Sixth Amendment Right to a Representative Jury.

This case also presents the significant constitutional question whether any death qualification of a jury is permissible in the wake of the incorporation of the Sixth Amendment's jury-trial guarantee into the Fourteenth. The Witherspoon decision was handed down only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); Witherspoon's trial, of course, long pre-dated Duncan; and the cases in which the Court has since applied Witherspoon have all been pre-Duncan cases or cases in which no Sixth Amendment challenge to the practice of death qualification was made. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 403 U.S. at 946-948 (1971). Prior to the effective date of Duncan (see DeStefano v. Woods, 392 U.S. 631 (1968)), the only federal constitutional rights enjoyed by a state criminal defendant in connection with the selection of his trial jury were those vouchsafed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had then recognized the obligation of the States not to exclude racial minority groups from the petit jury, see Smith v. Texas, 311 U.S. 128 (1940);

Hernandez v. Texas, 347 U.S. 475 (1954), but had not yet imposed upon state criminal trials the more exacting obligations of the Sixth Amendment. Compare Hoyt v. Florida, 368 U.S. 57 (1961), with Taylor v. Louisiana, 43 U.S.L.W. 4167 (U.S., Jan. 21, 1975).

Since Duncan, however, the Court has recognized that the Sixth Amendment guarantee of jury trial entitles a state criminal defendant to "a petit jury [drawn] from a representative cross section of the community." Taylor v. Louisiana, supra, 43 U.S.L.W. at 4169. In Taylor -- which marks only the latest exemplification of this principle [66/] -- the Court held that a male criminal

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66/ Between the dates of Duncan and Taylor, the Court clearly said several times that the selection of petit jurors from a representative cross section of the community was an essential requirement of the Sixth Amendment. In Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970), the Court suggested that such a requirement was imposed upon the States by Duncan, stating that the "very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S. at 332 (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)). See also Williams v. Florida, 399 U.S. 78, 100 (1970); Apodaca v. Oregon, 406 U.S. 404, 410 (1972); and see Peters v. Kiff, 407 U.S. 493, 502-504 (1972) (opinion of Mr. Justice Marshall).

defendant had standing to contest the exclusion of women from his trial jury without the necessity of demonstrating any specific prejudice because the exclusion of a distinctive population group "deprived him of the kind of fact finder to which he was constitutionally entitled." Id. at 4168. 67/

67/ "We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

Taylor v. Louisiana, supra, 43 U.S.L.W. at 4170.

As the Court has progressively clarified the nature of the "jury" guaranteed in state criminal proceedings by the Sixth Amendment, the cross section requirement has become increasingly essential and the permissibility of death qualification has therefore become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970), held that a jury of twelve was not an indispensable part of the Sixth Amendment right: all the Sixth Amendment required was that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . . " Id. at 100. This was so because the critical function of the jury was to provide a citizen group, representative of the community, which would serve to check possible Government oppression of criminal defendants. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require conviction by unanimous verdict in State criminal cases, since the jury's function could be served without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to groups defined by race, of course. See Taylor v. Louisiana, supra;

White v. Crook, 251 F. Supp. 401, 408-409 (M.D. Ala. 1966) (exclusion of women); Labat v. Bennett, 365 F.2d 698 (CA5 1966), cert. denied, 386 U.S. 991 (1967)(exclusion of wage earners); State v. Schowgurow, 240 Md. 121, 213 A.2d 475 (1965)(exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Apodaca v. Oregon, supra, 406 U.S. at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," because all groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined." And the Court plainly recognized in Witherspoon that jurors with scruple against the imposition of the death penalty form a distinctive, coherent and sizeable group in most communities from which juries are selected.[68/]

68/ See also, e.g., Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. COL. L. REV. 1 (1970); Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 STAN. L. REV. 1245 (1974).

Since a venireman was excluded from petitioner's post-Duncan trial jury on the sole ground of her conscientious scruples against the death penalty, the issue is presented here whether such an exclusion may be justified under the exacting standards of the Sixth Amendment. Admittedly, a defendant cannot object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit, because of the danger that such veniremen, if selected as jurors, would bring to the jury's deliberations attitudes that are inconsistent with their proper duty as jurors to determine the truth impartially. Under a statutory scheme like Florida's, however, it is the rightful duty of the jury to express community attitudes about punishment: "one of the most important functions any jury can perform [in the administration of such a statute] . . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, at 520 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Indeed, the Florida capital punishment statute implicitly contemplates the expression of a broad range of community sentiment regarding punishment, since it provides for a recommendation of sentence by a "majority of the jury," Fla. Stat. §921.141(3), and allows the trial judge to overrule this "recommendation," ibid. It would thus have been impossible for Venireman Miller to have "hung" the jury on the issue of sentence (assuming even that she

adamantly refused to vote in favor of the death sentence -- an assumption not justified by the voir dire record, see pp. 61-67, supra); and the vote of a majority of the jury to recommend life imprisonment would itself not have precluded the trial judge's imposition of a death sentence.[69/] The Court should determine, therefore, whether in this setting a criminal defendant is entitled by the Sixth Amendment to a jury panel which reflects a fair cross section of community sentiment -- a panel from which veniremen such as Mrs. Miller cannot be excluded for cause simply on account of their views regarding capital punishment.

69/ Jury recommendations of mercy have not forestalled the imposition of the death sentence in at least 16 cases. See note 13, supra.

75-5384

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1975

****

ERNEST JOHN VINSON,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

****

RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

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ATTORNEYS FOR RESPONDENT

Dated:

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IN THE

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ON WRIT OF CERTIORARI
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RESPONSE OF RESPONDENT,
STATE OF NORTH CAROLINA,
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 NC 326 (1975) and is appended to Petitioner's petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of veniremen on the grounds of their expressed attitudes toward the death penalty violated Petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Petitioner, Ernest John Vinson, was tried in the Superior Court of Wilson County, North Carolina, and was found to be guilty of the crime of rape. A sentence of death by asphyxiation of gas was pronounced. Petitioner appealed to the Supreme Court of North Carolina and the judgment was affirmed on the 6th day of June, 1975. Execution of the judgment was stayed in order to give Petitioner an opportunity to file a petition for a Writ of Certiorari in this Court.

Since the facts of this case have been fully stated by the Petitioner, and have been amplified in the opinion of the Supreme Court of North Carolina, they are not restated here.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTION 1

This question challenges that the imposition of the death penalty for the crime of rape violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

The petitioner asserts that the penalty of death is cruel and unusual punishment for non-injurious rape offenses. He also urges that the procedure through which the death penalty is applied under the law of North Carolina violates the Eighth and Fourteenth Amendments. Petitioner's assertions, in essence, question the propriety of the North Carolina Legislature to prescribe punishment. There is no valid reason for the Court to grant certiorari at this time to hear this question.

This Court granted certiorari to petitioner Jessie Thurman Fowler in the case of Fowler v. North Carolina, No. 73-7031 (Oct. Term, 1974) which, although a murder case, concerns both the issue of the constitutionality of the death penalty and the question as to whether penal policy is more appropriately to be reviewed by the Legislature than by the Judiciary. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975. Hence, petitioner's question has, in essence, been

accepted for hearing by the Court, and oral arguments before this Court have already been made. Therefore, any decision in this case should be dependent upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

II. THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTION 2

One of the jurors stated that under no circumstances and regardless of the evidence, she would not return a verdict of guilty if it meant the mandatory imposition of the death penalty.

Under North Carolina law, this juror was properly excused for cause. (State v. Monk, 286 N.C. 509, 212 S.E. 2d 125 (1975); State v. Ward, 286 N.C. 304, 210 S.E. 2d 407 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974); State v. Crowder, 285 N.C. 42, 203 S.E. 2d 38 (1974). It would appear then that the decision to excuse the juror for cause requires no clarification of North Carolina's law. It would also appear that the North Carolina law on this subject is not in conflict with the law of the Supreme Court of the United States under the case of Witherspoon v. Illinois, 391 US 510, 83 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), and again accordingly, the petitioner has failed to show prejudice and the petition to grant certiorari should be denied.

The case of Witherspoon v. Illinois, supra, establishes two things: (1) veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; and (2) veniremen who are unwilling to consider all of the penalties provided by law and who are irrefutably committed before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial, may be challenged for cause on that ground. In Witherspoon at 518, this Court said:

> "The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death a proper penalty. But in Illinois, as in other states, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in such decision."

This language from Witherspoon reflects an important ground of the reasoning in that case . . . a line of argument that is no longer applicable in North Carolina following the decisions of this Court in Furman v. Georgia, 408 US 238 (1972) and the Supreme Court of North Carolina in State v. Waddell, 282 NC 431, 194 SE 2d 19 (1973). North Carolina jurors no longer decide whether death is "the proper penalty", for the law now requires that the penalty of death be adjudged for the enumerated crimes.

While petitioner's argument that "identifiable segments of the community (cannot be systematically excluded from jury panels)" correctly states the law, that proposition is not exactly in keeping with the principles stated by this Court in Witherspoon.

> ". . . nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra., footnote 21 at p. 522.

Such veniremen as were excluded, although they may constitute an identifiable segment of the community, have no place on a jury, the sole function of which is find guilt or innocence. Their views respecting the propriety of the death penalty are a mere irrelevancy where the penalty is set by the law, and the jury has no discretion to set the penalty.

The right guaranteed by the Sixth Amendment is a right to a trial by an impartial jury; and it is this right which applies to the State by the due process clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 US 145, L.Ed. 2d 491. Except where racial exclusion is involved, an impartial jury means only a neutral one. Fay v. New York, 332 US 261, 91 L.Ed. 2043. Only juries which are prejudiced, Shepherd v. Maxwell, 384 US 333, 16 L.Ed. 2d 600; Witherspoon v. Illinois, 391 US 510, 20 L.Ed. 2d 776, or partially or mentally incompetent, U.S. ex rel Leguillou v. Davis, 115 F. Supp. 392 (D.C. vi 1953) do not meet this standard. The "broad cross-section" or "truly representative cross-section" requirements appearing in many Federal cases are not constitutionally mandated, Salisbury v. Grimes, 406 F. 2d 50, (5th Cir. 1969); Christian v. Maine, 404 F. 2d 205 (1st Cir. 1968); and in order

to fulfill constitutional requirements the States are only required to utilize a cross-section suitable in character and intelligence. Brown v. Allen, 344 US 443, 97 L.Ed. 469. Under Witherspoon then, a venireman should be willing to consider all the penalties which are provided by State law and he should not be irreparably committed before the trial has begun to vote against the death penalty regardless of any circumstances and facts which might be later introduced into evidence. Accord Boulden v. Holman, 394 US 478, 22 L.Ed. 2d 433, 89 S.Ct. 1138 (1969).

CONCLUSION

It is therefore respectfully submitted that the question concerning the constitutionality of the death penalty as applied under the law of North Carolina is already before this Court; that there is not evidence that the petitioner was deprived of any constitutional right by the fact that the trial judge properly excused a juror for cause upon her statement that under no circumstances would she regard the evidence which invoked a mandatory penalty of death where the punishment is mandatory. The Petition for Writ of Certiorari to the Supreme Court of North Carolina should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response of the State of North Carolina to Petition for Writ of Certiorari to the Supreme Court of North Carolina on petitioner by depositing the same in the United States mail to:

Mr. Robert A. Farris
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This the ____ day of September, 1975.

Charles M. Hensey